No. 98-966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CITY OF DALLAS, TEXAS, DODD MILLER
Petitioners,

VS.

DALLAS FIRE FIGHTERS ASSOCIATION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

On December 14, 1998, Petitioners City of Dallas, Texas and Dodd Miller ("Petitioners", "the City," or "Miller") petitioned the Court to issue a Writ of Certiorari and review the Judgment and Opinions issued August 5, 1998 and September 14, 1998 by the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") in favor of Respondents. For all the reasons set forth below, the Court should not issue a Writ of Certiorari in this case:

CLARIFICATION OF PETITIONERS' STATEMENT OF THE CASE

Petitioners' statement of facts mischaracterizes the Fifth Circuit's Opinion as to the factors weighing in favor of out of rank order promotions. (Pet. for Writ, p. 4). Specifically, the Fifth Circuit did not hold that there were five factors weighing in favor of "out of rank order promotions." *(Id.)* What the Fifth Circuit held was that there were five factors that the City pointed to as weighing in favor of the constitutionality of its promotional plan and that while these factors supported the City's position, they were insufficient as a matter of law to overcome the minimal record evidence of discrimination and only supported the use of alternative, non-race/gender based remedies. *Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.,* 150 F.3d 438, 441 n. 13 (5th Cir. 1998).

Furthermore, while not addressed by the Fifth Circuit, the District Court noted that the City's "banding" argument smacked of "hindsight justification." *Dallas Fire Fighters Ass'n, et al. v. City of Dallas, et al.,* 885 F.Supp. 915, 921-22, n.13 (N.D. Tex. 1995). The reason is that while the City implemented a "banding" policy in the 1993-98 AAP, it waited until April 12, 1995,

long after Respondents' summary judgment motions had been on file, to make its "banding" argument. Based upon this, the District Court made a determination that the City's "banding" argument was a hindsight justification for skip promotions. *(Id.)*. The District Court also found that the City's "banding" policy had the effect of encouraging race/gender based skip promotions and creating new biases and enforcing old stereotypes that were as pernicious and offensive as the archaic biases Title VII was designed to erase. *(Id.)*. For these reasons, the City's use of "banding" of test scores is not a factor that weighs in favor of the constitutionality of Petitioners' policy and practice of race/gender based skip promotions.

Finally, Petitioners' Statement of the Case fails to adequately address the central and dispositive undisputed fact of this case: race/gender were the sole and only comparative and determining factors utilized by Petitioners in the promotions at issue here. (R. Vol. V., p. 7; R. Vol. VI., Exhibit B). In short, it is undisputed that while all candidates appeared on a list of eligibles, Petitioners made no effort whatsoever to select individuals for promotion based upon any factor other than their race/gender.

ARGUMENT AND AUTHORITIES

A. Petitioners Fail To Demonstrate Sufficient Evidence Of Present Effects Of Past Discrimination By The Fire Department To Justify Race/Gender Based Skip Promotions Under The Equal Protection Clause

The Fifth Circuit correctly held that Petitioners failed to meet their burden of demonstrating the present effects of past racial/gender discrimination in the fire department sufficient to justify trammeling the rights of innocent third parties through race-and/or gender-based skip promotions. *Dallas Fire Fighters Ass'n,* 150 F.3d at 441. The only evidence offered by Petitioners in support of their drastic race/gender based skip promotions consists of a 1976 Consent Decree between the City and the United

States Department of Justice, along with Justice Department "findings," and a statistical analysis reflecting an underrepresentation of minorities and females in the fire department. (Pet. for Writ, pp. 8-14).

However, as noted by the Fifth Circuit, the Justice Department's "findings" and the Consent Decree entered into between the City and the Justice Department are insufficient, as a matter of law, to justify race/gender based skip promotions in the 1990s. *Dallas Fire Fighters Ass'n,* 150 F.3d at 441. Indeed, the Justice Department's "findings" and the Consent Decree involved the fire department's ***hiring*** practices prior to 1976; whereas here, the fire department's ***promotional*** practices in the 1990s are at issue. Furthermore, the Justice Department's "finding of discriminatory practices" consisted of nothing more than a vague, conclusory statement of statistical evidence of hiring "inconsistent with Title VII." (R. Vol. V, p.179). The Consent Decree spoke only of "the effects of any past discrimination that ***might*** have occurred" (emphasis supplied); not a finding that past discrimination did occur. (R. Vol. V, p.172). A race/gender conscious remedy implemented by a public employer to address possible past Title VII violations that "might" have occurred is insufficient to meet the rigorous limitations of the Equal Protection Clause as a matter of law. *Wygant v. Jackson Board of Ed.,* 476 U.S. 267, 273-74, 106 S.Ct. 1842 (1986).

Moreover, in *Black Fire Fighters Ass'n v. City of Dallas,* 805 F.Supp. 426 (N.D. Tex. 1992), black fire fighters sued the City claiming racial discrimination in promotions, among other things. The City and the Black Fire Fighters Association then attempted to enter into a consent decree calling for, among other things, race based skip promotions. DFFA, a party herein, intervened. In that case, the City never admitted that it engaged in racial or gender discrimination in the fire department and the District Court refused to permit race based skip promotions to be included in the proposed consent decree (which was upheld on

appeal by the Fifth Circuit). *Black Fire Fighters Ass'n v. City of Dallas*, 19 F.3d 992 (5th Cir. 1994).

Petitioners' contention that the underrepresentation of minorities and females at various levels of the fire department is a sufficient factual basis to implement a drastic racial/gender based skip promotion remedy is not and ought not be the law. No court, and certainly not this Court, has held that statistical evidence frees a public employer from the Equal Protection Clause limitations and permits it to use race and/or gender as a trump card in making employment decisions. *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 992, 108 S.Ct. 277, (1988); *Maryland Troopers Ass'n v. Evans*, 993 F.2d 1072 (4th Cir. 1993). Regardless of what Title VII jurisprudence mandates or permits with respect to statistical disparities, the Equal Protection clause limits must be adhered to by public employers.

Finally, there is no conflict between the Fifth Circuit's ruling in this case and *McNamara v. City of Chicago,* 138 F.3d 1219 (7th Cir.), *cert. denied* _U.S._, 1998 WL 423784 (1998). Unlike the case at bar, *McNamara* involved direct evidence of racial discrimination by senior officials in the Chicago Fire Department well into the 1980s that made the Chicago Fire Department "uncongenial" to minorities. *Id., at 1224*. Based specifically on this factual finding, the Seventh Circuit determined that the inference of racial discrimination causing an underrepresentation of minorities in the captain position was justified. *(Id.)*. In the case at bar, there is no such evidence of racial discrimination by any fire department officials reaching into the 1980s and thereby affecting promotions and/or causing underrepresentation in the 1990s. Instead, all Petitioners can point to here is a dated and nebulous Justice Department "finding," a dated and speculative Consent Decree, and a bare statistical imbalance. As such, this case and the *McNamara* case are wholly distinguishable, are not in conflict, and do not provide any compelling basis for this Court to issue a Writ of Certiorari.

B. Petitioners' Race/Gender Based Skip Promotion Practice/Policy Is Not Narrowly Tailored To Achieve Any Compelling Governmental Interest And Violates The Equal Protection Clause

Petitioners' contention that race/gender based skip promotions are necessary to remedy the present effects of past discrimination is simply not supported by the evidentiary record. (Pet. for Writ, pp. 15-24). Indeed, the lack of evidence of the present effects of past race and/or gender discrimination in promotions by the fire department does not even raise to the level of a scintilla. This lack of evidence renders Petitioners' use of drastic race/gender based skip promotions not narrowly tailored as a matter of law. *Wygant*, 476 U.S. at pp. 273-74.

Moreover, the City's own AAP provides alternative remedies to deal with any effects of any possible past racial/gender discrimination by the fire department including, but not limited to, validating promotional exams, recruiting minorities, eliminating seniority points on exam scores, and initiating a tutoring program. (R. Vol. V., pp. 38-90). The fact that minorities and/or females continue to be underrepresented in certain jobs does not mean that alternative remedies have not been effective, but only that they do not operate as quickly as out of rank promotions based upon race and/or gender. Indeed, Petitioners have presented no evidence that continued underrepresentation of minorities and/or females in the fire department is the result of either unlawful discrimination or ineffective alternative remedies. While these alternative remedies do not eliminate statistical imbalances as quickly as skip promotions, where the Equal Protection Clause is concerned, time is not of the essence.

There is no conflict between the Fifth Circuit's ruling and United States Supreme Court case law. The Fifth Circuit was aware that out of rank promotions do not pose as great a burden on non-minorities and males as do layoffs and discharge but,

given the minimal record evidence of racial/gender discrimination within the fire department, Petitioners were not constitutionally justified in interfering with legitimate expectations of innocent minorities in promotion based upon exam performance. *Dallas Fire Fighters Ass'n*, 150 F. 3d at 441. This Court has never held that, as a matter of law, the delayed opportunities imposed on innocent non-minorities by race/gender conscious promotions is not an unconstitutional burden. *See, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 480, 106 S.Ct. 3019 (1986).

Petitioners assert that the four factors considered by this Court in determining whether a race/gender based remedial measure is narrowly tailored supports Petitioners' use of race/gender based skip promotions. To the contrary, the factors considered by this Court in determining whether race/gender based remedial measure are narrowly tailored do not at all support Petitioners' race/gender based skip promotions. To begin with, Petitioners' weak to non-existent showing of present effects of past discrimination counsels strongly against the use of race/gender based remedies and only supports alternative remedies that utilize other criteria besides race/gender. Petitioners' skip promotions are not flexible, temporary or limited in that they are implemented based upon a statistical imbalance where ever it may arise, regardless of reason, with no logical stopping point. Furthermore, there is a complete lack of relationship between the numerical goals of the AAP with respect to each position in which skip promotions occurred and the relevant feeder pools. Indeed, across the board, the AAP's promotional goals for minorities and females are grossly out of proportion with the representation of minorities and females in the relevant feeder pools. Finally, the impact on innocent non-minorities in the form of delayed career advancement, pretermitted careers, and internal departmental strife is unconstitutionally high given the lack of a scintilla of evidence of past race/gender discrimination in promotions by the fire department.

Finally, the Fifth Circuit's ruling does not conflict with *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721 (9th Cir. 1993), *cert. denied*, 507 U.S. 1004 (1993). Neither *Officers for Justice* or any other case has held that "banding" is a sufficient basis for permitting all race/gender based employment decisions by a public employer as a matter of law. To the contrary, as noted by the Ninth Circuit, "banding" is but one factor to be considered amongst other factors. *(Id.)*. The Fifth Circuit correctly determined that Petitioners' after the fact policy of "banding" was insufficient, even in conjunction with other evidence, to make race/gender based skip promotions narrowly tailored to pass Equal Protection clause muster. Furthermore, the fact that the Ninth Circuit found the "banding" process in *Officers for Justice* to be acceptable does not mean that the Ninth Circuit held that "banding" ultimately makes all racial/gender promotional decisions constitutional. The lawfulness of the "banding" process in *Officers for Justice* is limited to that case and the Fifth Circuit's Opinion here does not conflict with it.

The evidentiary record makes clear that this case was properly decided by the Fifth Circuit based upon existing and settled United States Supreme Court precedent and does not conflict with the decisions by other Courts of Appeal. Indeed, the evidentiary record in this case precludes this issue from being sufficiently unique or compelling to warrant this Honorable Court's review.

C. Petitioners' Race/Gender Based Skip Promotions Violates Title VII

As set forth above, Petitioners' race/gender based skip promotions violate the Equal Protection Clause. As such, the Fifth Circuit properly held that, outside of the context of Respondents' deputy chief claims, there was no need to reach Respondents' Title VII claims as Petitioners' liability already attached. *Dallas Fire Fighters Ass'n*, 150 F.3d at 442. However, even if this Court

agrees with Petitioners' contention that the Fifth Circuit erroneously granted Respondents' Motion for Summary Judgment based upon the Equal Protection Clause, the District Court's granting of Respondents' summary judgment motion with respect to their Title VII claims (which was not disturbed by the Fifth Circuit) was proper and free of error. (Pet. for Writ, pp. 24-29).

Specifically, as noted by the District Court, Petitioners' race/gender based skip promotions violated Title VII because of gross disparities between the percentages of minorities and females in positions where skip promotions occurred and the percentages of minorities and females in the relevant feeder pools. *Dallas Fire Fighters Ass'n*, 885 F. Supp. at 926. For example, with respect to the driver engineer position, the 1988 AAP called, across the board, for a twenty-five (25%) percent promotion goal for blacks, ten (10%) percent for hispanics and ten (10%) percent for females. (R. Vol. V., p. 103). But in the second driver position, which is the feeder pool for the driver engineer position, blacks only made up sixteen (16%) percent of the pool, hispanics seven point three (7.3%) percent and females one point one (1.1%) percent. (R. Vol. V., pp. 64-66). Similarly, with respect to the lieutenant position, the 1988 AAP called for twenty-five (25%) percent promotion goal for blacks, ten (10%) percent for hispanics and five (5%) percent for females. *(Id.)*. But in the driver engineer feeder position, blacks only made up ten (10%) percent of the pool, hispanics five (5%) percent and females one point six (1.6%) percent. *(Id.)*. With respect to the deputy chief (executives) position, the 1988 AAP called for a twenty-five (25%) percent promotional goal for blacks and a ten (10%) percent goal for hispanics. *(Id.)*. However, the actual percentage of blacks in the captain feeder position was one point eight (1.8%) percent, the fire battalion/section chief position four point nine (4.9%) percent and the lieutenant position two point nine (2.9%) percent. *(Id.)*. The actual percentage of hispanics in the captain

feeder position was zero (0%) percent, fire battalion/section chief position zero (0%) percent, and the lieutenant position two point nine (2.9%) percent. *(Id.)*. This grossly imprecise fit between Petitioners' goals and the relevant feeder pools violates this Court's prohibition in *Johnson v. Transportation Agency of Santa Clara*, 480 U.S. 616, 636-40, 107 S.Ct. 1442 (1987) against "blind hiring by numbers."

Additionally, Petitioners' contention that race/gender based skip promotions do not unnecessarily trammel the rights of non-minorities because they do not create an absolute bar to advancement is simply not the law. As fully explored above, with respect to the Equal Protection Clause claims, serious delay in promotions experienced by Respondents has resulted in permanent damage to their seniority, upward mobility, earning capacity, benefits and careers despite the fact that they were totally innocent and have not benefitted from any alleged past unlawful actions by the fire department.

This reality is underscored by a very important point not addressed in Petitioners' Petition for Writ of Certiorari: the undisputed fact that race/gender were the sole and only comparative and determining factors in the race/gender based skip promotions at issue here. (R. Vol. V., p. 7; R. Vol. VI., Exhibit B). Petitioners' actions in this regard run afoul of this Court's pronouncement in *Johnson* that race and gender may only be considered by a public entity if they are a par factors among other comparative factors in employment decisions made pursuant to a statistical underrepresentation in a particular job class. 480 U.S. at 640-42. This violation of *Johnson*, when coupled with the lack of evidence of present effects of past discrimination by the fire department and the imprecise fit between Petitioners' racial/gender goals and relevant feeder pools absolutely makes delay caused by skip promotions an unlawful burden on Respondents under Title VII.

Given the foregoing evidentiary record, this issue is not sufficiently compelling or unique to warrant this Honorable Court's review. As such, this Honorable Court should declined to issue a Writ of Certiorari with respect to the Fifth Circuit's ruling on Respondents' non-deputy chief Title VII claims.

CONCLUSION

For all of the foregoing reasons, this case presents no compelling reasons for this Honorable Court to issue a Writ of Certiorari. As such, Respondents respectfully pray that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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